Siade asserts, with no legal support, that this Court's holdings in *Great-West* and *Mertens* only apply to suits against non-fiduciaries, and do not apply in a suit against an alleged fiduciary. Pet. at 5, 7. However, there is nothing in *Great-West* or *Mertens* to so limit the holding in either case. Both of those cases interpret the scope of "equitable" relief recoverable under ERISA § 502(a)(3), and neither case depends upon whether the defendant is a fiduciary. Because § 502(a)(3) applies to suits brought against any person—fiduciary or non-fiduciary—there is no grounds for the distinction that Siade attempts to make. *See Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 246 (2000) (§ 502(a)(3) allows appropriate equitable relief without regard to which party may be a defendant in the case).

The *amicus* brief filed by the United States in *Aetna Health*—which is the only authority Siade cites for his argument that an ERISA beneficiary should be able to recover under § 502(a)(3) all relief that was available against a trustee in a court of equity—is not controlling law. Pet. at 6-7. This Court expressly declined to address the argument made by the United States in *Aetna Health* since the petitioner in that case did not bring a claim under § 502(a)(3). *See Aetna Health*, 542 U.S. at 221, fn 7. But the United States as amicus made this exact same argument in both *Great-West* and *Mertens*, and this Court explicitly rejected the argument in both cases. *See Great-West*, 534 U.S. at 219; *Mertens*, 508 U.S. at 255-56.

Siade asks this Court to engraft onto the Court's established interpretation of equitable relief under § 502(a)(3) a new rule to apply only when the defendant is a fiduciary. There is nothing in § 502(a)(3) or this Court's precedents to support such a double-standard. As this Court has twice held, § 502(a)(3) does not authorize money damages just because a court sitting in equity is authorized to award money damages against a fiduciary for breach of trust. These holdings are

controlling, and this case presents no new issues for this Court's review.

D. This Court's Prior Precedents Compel The Conclusion That The Relief Siade Seeks Is Not Equitable Relief.

Siade has not asserted a claim for equitable relief. A request for the payment of benefits that a beneficiary did not receive is not equitable relief, even when a petitioner has styled it as a request for "restitution." In *Great-West*, this Court held that "not all relief falling under the rubric of restitution" qualifies as "equitable relief" under ERISA § 502(a)(3). 534 U.S. at 212. The Court held that for restitution to be equitable relief, the funds sought must be clearly traceable to particular funds or property belonging to the plaintiff:

> [A] plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. . . . Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West, 534 U.S. at 213-214 (citations omitted). When a petitioner simply claims a contractual entitlement to benefits, but cannot identify particular funds in the defendant's possession, the restitution is therefore legal restitution. *Id.*

In this case, both the district court and Court of Appeals, relying on *Great-West*, held that Siade cannot identify any specific funds to support a claim for equitable restitution. The district court found that Siade's claim for damages does not seek to restore to Siade any "'particular funds or property

in the defendant's possession.' Plaintiff does not and can not identify any such funds, but rather seeks to impose personal liability upon Defendants." App. 18. The Court of Appeals affirmed: "GHP holds no readily identifiable funds or property belonging to Siade's estate to form the basis of a constructive trust." App. 10-11.

The courts below properly applied *Great-West* to the facts of this case and determined that the monetary relief that Siade seeks is not equitable restitution. To the extent Siade alleges that the courts below misapplied the law established by *Great-West*, he has not presented an issue that warrants a grant of certiorari. *See* Sup. Ct. Rule 10. Moreover, he is simply incorrect.

Siade's reliance on *Varity Corp. v. Howe*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996) is misplaced. Siade relies upon the decision of the Court of Appeals, which awarded monetary damages under § 502(a)(3). *See* Pet. at 8. While this Court affirmed the Court of Appeals' basic holding that ERISA authorizes a lawsuit for individualized equitable relief—a legal proposition not disputed by either party in the instant lawsuit—this Court did not address whether the damages awarded by the lower court were in fact equitable relief. To the contrary, the Court expressly stated that the monetary relief awarded by the lower court "is not at issue here." 516 U.S. at 495. To the extent that the Court of Appeals in *Varity* determined that monetary benefits could be awarded as equitable relief under § 502(a)(3), that holding did not survive this Court's subsequent decision in *Great-West*.

Siade's argument that it does not matter whether there is an identifiable amount of funds is directly contrary to the holding in *Great-West*. The distinction Siade attempts to draw between the amount of funds and the qualitative nature of the funds is not supported by any legal authority. Pet. at 8. To the contrary, the very nature of a constructive trust presumes that there is a *specific* sum of money belonging to

plaintiff that can clearly be traced to particular funds in defendant's possession. *Great-West*, 534 U.S. at 213-14.

This Court recently re-affirmed the holding of *Great-West* that equitable restitution only lies when the plaintiff seeks "to impose a constructive trust or equitable lien on 'particular funds or property in the defendant's possession.'" *Sereboff v. Mid Atlantic Medical Services, Inc.*, 2006 WL 1310754 at *4 (U.S. May 15, 2006). In *Sereboff*, this Court allowed a claim under § 502(a)(3)(B) based upon an equitable lien arising "by agreement" of the parties, which is a "different species of relief" from the equitable restitution that Siade seeks here. *Id.* at *6.

Finally, Siade's argument that he is entitled to relief despite an alleged co-mingling of funds rests upon a faulty premise; it assumes that identifiable funds ever existed. Pet. at 9-10. In both cases cited by Siade, the issue was whether a party lost an action for restitution when defendant had possession of an identifiable sum of money that was then co-mingled with defendant's other funds. *See Brown v. New York Life Ins. Co.*, 152 F.2d 246 (9th Cir. 1945); *Harris Trust & Savings Bank*, 530 U.S. 238. But here, where the lower courts have already held that GHP never had possession of any identifiable funds belonging to Siade, the issue of co-mingling is irrelevant.

CONCLUSION

Wherefore, Respondents respectfully request that this Court deny the petition for writ of certiorari. Siade is simply seeking to rehash principles of law soundly settled by this Court. Siade does not present any new legal issues or advance any compelling reason why this Court should grant certiorari in this case.

Respectfully submitted,

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